

U.S. BANKRUPTCY COURT
DISTRICT OF OREGON
FILED

August 30, 2007

Clerk, U.S. Bankruptcy Court

Below is an Opinion of the Court.


ELIZABETH PERRIS
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In Re:) Bankruptcy Case
CAROLINA TOBACCO COMPANY,) No. 05-34156-elp11
) MEMORANDUM OPINION RE OBJECTION
Debtor.) TO CLAIM OF CPI NV
)

In 2005, debtor Carolina Tobacco Company (CTC) filed a petition under chapter 11 of the Bankruptcy Code.¹ In its schedules filed in this case, CTC listed a claim by CPI NV in the amount of \$534,765.73. A number of states that are creditors in this case object to this claim, arguing that it is not a debt of debtor CTC, but instead is an obligation of Tideline International Company (Tideline), an affiliated company of debtor. Because there is no credible evidence to prove that the claim is a debt of CTC, I conclude that the objection is well taken, and will disallow the claim.

¹ 11 U.S.C. § 101 et seq.

FACTS

CPI NV is a Belgian company that engages in the international trading of goods. Its managing director is Axel Caudron. In the early 1990s, Caudron met David Redmond, who owned Tideline. Caudron on behalf of CPI NV and Redmond on behalf of Tideline engaged in extensive international trading through the 1990s, including trading of tobacco products. These trades could involve millions of dollars worth of goods and were done primarily over the telephone. Such trades were rarely if ever supported by any written documentation between the two firms. The two orally agreed to share profits fifty-fifty.

In the late 1990s, Redmond approached Caudron with the idea of creating a generic, private label cigarette for the United States market. The goal was to produce a cigarette that tasted like the United States version of Marlboro cigarettes. This cigarette later became known as the Roger brand.

16 Redmond wanted Caudron to use his contacts in the international
17 tobacco trading business to help locate a manufacturer for the new label
18 cigarette and to assist in the product's development. Caudron agreed to
19 work on the project. He made contacts with cigarette manufacturers
20 around the world, looking for a manufacturer that could produce the
21 quality of product that Redmond and Tideline wanted. Eventually, Caudron
22 introduced Redmond to House of Prince, which had manufacturing facilities
23 in Latvia. House of Prince was able to work with Tideline to create the
24 taste that Redmond wanted and to provide manufacturing facilities for the
25 cigarettes.

26 Caudron also provided certain other services related to the Roger

1 brand, including taste testing and focus groups. Caudron and Redmond did
2 not discuss compensation for those services until after they were
3 provided. Redmond sought to make Caudron a fifty-fifty partner in the
4 brand; Caudron did not want a partnership and instead sought compensation
5 for his services.

In the meantime, the two men continued to engage in trading transactions on behalf of CPI NV and Tideline.

8 During the time that Redmond and Caudron were working to create and
9 market the Roger brand cigarette, Redmond formed CTC to manufacture and
10 market the new brand. CTC was incorporated in 1999. Tideline owns the
11 Roger brand, but CTC has an exclusive license for the brand, which it now
12 manufactures² and markets.

When CTC filed its chapter 11 petition in 2005, CTC scheduled a debt of \$534,765.73 owing to CPI NV. The nature of the claim was described in the schedules as "Ten-year note payable due to over distribution of profits from previous years." Exh. 1 at 2. In response to discovery requests made by the states, debtor and CPI NV both provided two different documents as supporting documentation for the claim. One was an invoice dated February 1, 2001, purportedly from CPI NV to CTC/Tideline, for \$575,228.45. That invoice said it was for:

21 Payment concerning CPI NV's commission and finder's fees for world-
wide factory search resulting in producing the ROGER® brand
22 cigarettes for Carolina Tobacco Company for the North American
Market (via House of Prince Riga); Management and staff feasibility
23 for American tobacco blend with USA Marlboro-like taste; location of
tobacco buyers and blenders to nearly duplicate Marlboro USA taste
24 (via House of Prince Riga, Latvia).

² By the time CTC filed bankruptcy, CTC had begun to manufacture the Roger cigarettes itself.

1 Period of October 1997 to January 1999.

2 Exh. 7.

3 The other document was an internal Tideline document dated February
4 5, 2004 and signed by Redmond, which said:

5 RE: Payment to CPI NV for incorrect division of profits - Previous
6 Years

7 As we have discussed and agreed upon, Tideline International Company
8 owes CPI NV exactly EURO 331.729 for previous years (sic) business
9 transactions.

10 Therefore, this letter is to confirm the agreement by and between
11 Tideline International Company ("Tideline") and CPI NV as follows:

12 1. As of September 30, 2003 the outstanding balance owed by
13 Tideline to CPI NV is EUR (sic) 331.729,

14 2. This amount will be paid by Tideline over the next 10 years at
15 a rate of about EURO 33.000 per year starting in year 2004, and
16 agrees to make the year 2004 payment on or before September 15,
17 2004.

18 3. This letter confirms that payment from Tideline shall be
19 completed in 10 years with the first (1st) payment in 2004 and the
20 last payment in 2013 for the balance owed (e.g. about Euro 33,172,90
21 (sic))

22 4. Funds for the year 2004 payment are to be wired to CPI NV
23 account at KBC Bank [account number].

24 Exh. 8. This document came to be referred to as "the promissory note."

25 Later, in April 2007, another document labeled "invoice" appeared in
26 response to a subpoena on Tideline's accountant. That invoice, which was
27 in the same form as the 2001 invoice, was directed to Tideline. It was
28 dated February 1, 2004, for \$575,228.45, and said that it was for:

29 Settlement for Imperial Tobacco Company (Regal® and Superking®
30 brands) business, and

31 Settlement for outstanding balances regarding Marlboro and RJR
32 business in the USA (jointly with CPI USA), and

33 First Payment concerning CPI NV's commission and finder's fees for

producing the ROGER® brand for the North American Market (via House of Prince Riga).

Exh. 31 at 5, 18.

The obligation to CPI NV was carried on Tideline's books until it was transferred to CTC's books in March, 2005, shortly before debtor filed its chapter 11 petition. Although Redmond testified that he had tried to get his Chief Financial Officer (CFO) to transfer the obligation earlier, because he considered the debt to be related to the Roger brand cigarettes and thus the obligation of CTC, his CFO Kevin Richeson testified that he was not asked to transfer the debt from Tideline to CTC until he received an email communication from Redmond on March 14, 2005.

The explanation for the obligation changed during the course of this case. In June 2006, Caudron on behalf of CPI NV signed a one-page declaration saying that CPI NV issued the 2001 invoice to Tideline/CTC for a commission and finder's fee. Exh. 37 at 8.³ The 2001 invoice was attached to that declaration. In September 2006, Caudron signed a response to the states' discovery requests, under penalty of perjury, that the parties had agreed in January 2001 that CPI NV would be paid \$575,228.45 for its services. He attached the 2001 invoice to his response, and swore that the invoice was a true and accurate copy of an invoice sent to CTC and Tideline by CPI NV. Caudron explained that the amount of the obligation was based on an amount per shipping case of cigarettes. He also explained that the difference in the amount of the

³ The copy of the declaration contained in Exh. 37 is not signed. The copy of the same declaration filed with the court on June 12, 2006, contains an electronic signature.

1 obligation appearing in the 2001 invoice, \$575,228.45, and the amount
2 showing in the 2004 promissory note, EURO 331,729, was simply the
3 \$575,228.45 with an interest component removed.

4 At his September 25, 2006 deposition, Caudron testified that he and
5 Redmond never had a specific agreement about how much CPI NV would be
6 paid for its services with relation to the Roger cigarette brand. He
7 said they probably negotiated the amount in 2000 or 2001. In late 2003
8 or early 2004, CPI NV's auditors wanted some documentation for a debt of
9 Tideline that was being carried on CPI NV's books, so Caudron asked
10 Redmond to sign something to provide that documentation.

11 The document that Redmond signed is the promissory note dated
12 February 5, 2004, which shows that Tideline owes CPI NV EURO 331,729 "for
13 incorrect division of profits." Exh. 8. It also indicates that Tideline
14 will pay the debt over 10 years at a rate of EURO 33,000 per year.

15 In October 2006, CPI NV filed an Amended Response to the states'
16 discovery requests. That amended response, again signed by Caudron under
17 penalty of perjury, continued to swear that the parties had agreed to the
18 \$575,228.45 figure in January 2001, that the amount was based on an
19 amount per shipping case plus an interest component, and that the parties
20 had agreed in January 2004 to a 10-year payment plan. CPI NV continued
21 to rely on the 2001 invoice to show that CTC was obligated on the debt.

22 At his May 30, 2007 deposition, less than three weeks before the
23 trial on this claim objection, Caudron for the first time repudiated the
24 February 2001 invoice. He testified that it could not have been created
25 or sent by CPI NV, because Belgian law requires certain information to be
26 on an invoice, and this invoice did not contain that information. He

1 also testified that the February 1, 2004 invoice purportedly from CPI NV
2 to Tideline, reflecting a total of \$575,228.45 for three separate items
3 (Exh. 31 at 18), was not prepared or sent by CPI NV.

4 Caudron testified that an email dated October 16, 2003, from CPI
5 NV's accountant to Redmond, advising him that there was an outstanding
6 balance of \$575,228.45⁴ that Tideline owed to CPI NV, triggered his
7 memory of how the \$575,228.45 amount was determined.

8 According to this version of events, Caudron and Redmond had never
9 settled on an amount that should be paid for CPI NV's services in
10 relation to the Roger brand, but had discussed that it should be
11 somewhere around \$500,000. Then, in late 2003, CPI NV's accountant
12 reported that CPI NV's books showed that Tideline owed CPI NV \$575,228.45
13 on trading obligations. After further investigation, it was determined
14 that Tideline had paid all of its trading obligations, but that, due to
15 changes in currency exchange rates and the fact that accounting in
16 Belgium was required to be reported in Euros but payments on tobacco
17 products were made in US dollars, there was an exchange rate difference
18 of \$575,228.45 for the trading business that Tideline had engaged in with
19 CPI NV. Rather than write off this amount on its books, Caudron and
20 Redmond agreed that Redmond would pay an amount equal to the exchange
21 rate difference and, in exchange, CPI NV would forgo any other

22

23 ⁴ Tideline produced two versions of this email during discovery.
24 The first shows the email message from the accountant to Redmond, stating
25 an outstanding balance of \$175,228.45. Exh. 26 at 68. The second is a
26 copy of that same message forwarded by Redmond to a different Tideline
email address. The message is identical to the first, except that the
amount of the outstanding balance was \$575,228.45 instead of \$175,228.45.
Exh. 26 at 69. No witness had an explanation for the discrepancy.

1 compensation for services with respect to the Roger brand cigarettes.

2 Caudron also testified in his deposition that, over the next few
3 weeks after the accountant had found the \$575,228.45 problem on CPI NV's
4 books, the accountant did some recalculations and reduced the amount of
5 the exchange rate difference to EURO 330,729. However, because Caudron
6 and Redmond had already agreed to the \$575,228.45 figure as compensation
7 for the services provided for the Roger brand, CPI NV did not reduce the
8 amount due to the EURO 330,729.

9 Redmond asked for payment terms, and Caudron agreed that he could
10 pay over 10 years. According to Caudron, the auditors wanted
11 documentation of the EURO 330,729 debt, so he asked Redmond to create a
12 document to reflect that amount. That document is the February 2004
13 promissory note that is Exh. 8. According to Caudron, although the note
14 says Tideline owes EURO 330,729, payable at EURO 33,000 per year for 10
15 years, the actual debt is \$575,228.45.

16 Two days after the May 30 deposition, CPI NV submitted a Second
17 Amended Response to the states' discovery requests. In that response,
18 Caudron continued to state, under penalty of perjury, that the amount due
19 for services provided with regard to the Roger brand was agreed to in
20 January 2001, even though two days before he had testified that the
21 agreement did not occur until this accounting issue arose in late 2003.
22 He also continued to represent that the difference between the
23 approximately \$575,000 and the approximately EURO 330,000 was an interest
24 component. His deposition testimony had explained that discrepancy
25 differently. The discovery response also continued to admit under
26 penalty of perjury that the 2001 invoice was sent to CTC and Tideline by

1 CPI NV, even though Caudron had just testified two days earlier that the
2 invoice could not have been prepared by CPI NV.

3 At trial, Caudron's testimony tracked his May 2007 deposition
4 testimony, with regard to the timing of the determination of the debt and
5 the basis for it. He testified that he thought that CTC owes the debt
6 along with Tideline, because CTC, which manufactures and markets the
7 Roger brand, got the benefit of CPI NV's services in finding a
8 manufacturer and developing and marketing the product.

9 The employees of Redmond, Tideline, and CTC who were responsible for
10 accounting testified at trial that they had not seen any of the three
11 documents (the 2001 invoice, the 2004 promissory note, and the 2004
12 invoice) that CTC and CPI NV were using in this proceeding to support the
13 CPI NV claim.

14 Tideline made the 2004, 2005, and 2006 annual payments on the
15 obligation to CPI NV.

16 ISSUE

17 Whether CPI NV has proved its claim against CTC.

18 DISCUSSION

19 Bankruptcy Rule 3001(f) provides that a properly filed proof of
20 claim is "prima facie evidence of the validity and amount of the claim."
21 Fed. R. Bankr. P. 3001(f). The burden is on "the objecting party to
22 present evidence to overcome the *prima facie* case." In re Murgillo, 176
23 B.R. 524, 529 (9th Cir. BAP 1995). If the objecting party presents
24 sufficient evidence to rebut the presumption of the validity of the
25 claim, the ultimate burden of proof on the claim falls on whatever party
26 would bear that burden outside bankruptcy; here, on the claimant.

1 Raleigh v. Illinois Dept. of Rev., 530 U.S. 15, 21 (2000)(burden of proof
2 remains where substantive law puts it); In re Garner, 246 B.R. 617, 622
3 (9th Cir. BAP 2000). Where, as here, the claimant does not file a proof
4 of claim, but the claim is instead scheduled by the debtor as not
5 disputed, contingent, or unliquidated, the claim is deemed filed, 11
6 U.S.C. § 1111(a), and under Bankruptcy Rule 3003 "is accorded the same
7 evidentiary effect as is one that is actually filed by the creditor." 9
8 Lawrence P. King, Collier on Bankruptcy ¶ 3003.02[1] (15th ed. Rev.
9 2003)(footnote omitted).

10 The states make two legal arguments and one factual argument for
11 disallowing this claim: that it is unenforceable because it violates the
12 statute of frauds, that it should be disallowed because of false
13 statements made in support of the claim, and that CPI NV has not proved
14 its claim. I conclude that the states should prevail based on the last
15 of the three arguments.

16 As I explain below, the states presented sufficient evidence to
17 overcome the *prima facie* validity of the claim, including but not limited
18 to false testimony and documentation and a myriad of changing stories
19 presented by both CTC and CPI NV in support of the claim. CPI NV has not
20 provided believable evidence from which I could find that the claim is
21 one belonging to CTC, as opposed to Tideline.

22 First, the basis for the claim and the explanation for the amount
23 have changed numerous times over the course of this case. Given the
24 testimony under oath that the claim was based on an incorrect division of
25 profits, which would relate to profits shared between CPI NV and
26 Tideline, and belated sworn testimony that it related to services

1 provided for the Roger brand for the benefit of CTC and Tideline, as well
2 as the other versions of the basis for the debt that emerged over the
3 life of this case, it is impossible to tell which sworn version of the
4 facts is the true version.

5 Second, there is no credible documentary evidence that this debt is
6 owed by CTC rather than Tideline. The only written documentation in
7 existence, other than documentation that has been shown to be fabricated,
8 is the February 2004 promissory note, which refers to the obligation as
9 belonging to Tideline. Although there was testimony that the services
10 provided benefitted the Roger brand and therefore benefitted both CTC and
11 Tideline, the fact of the matter is that the services were begun before
12 CTC existed, and no one ever made an effort to transfer the obligation to
13 CTC after its incorporation, until very shortly before this bankruptcy
14 case was filed, or to allocate the cost of services provided for the
15 benefit of CTC as opposed to Tideline. Tideline owns the Roger brand; CTC
16 has a license to manufacture and market the brand. Thus, Tideline as
17 well as CTC gained a benefit from the services related to the brand.
18 That would help explain why Tideline has made the three annual payments
19 on the obligation.

20 Third, even the documentation that was presented, other than the
21 fabricated 2001 invoice, shows that at least a portion of the debt is for
22 transactions engaged in by Tideline, not by CTC. The 2004 promissory
23 note says that the debt is for incorrect division of profits "for
24 previous years (sic) business transactions." Exh. 8. The 2004 invoice,
25 which was also fabricated, reflects that the debt is for three items,
26 only one of which relates to the Roger brand. Thus, even the document

1 apparently fabricated by Redmond, Tideline, or CTC to reflect the debt
2 shows that the debt is only partially related to the Roger brand. There
3 was no evidence that CTC would have received a benefit from any of the
4 other services for which the debt was purported to arise. If the debt
5 was only partially for the benefit of CTC, no one has attempted to
6 allocate that debt between Tideline and CTC, but instead has tried to
7 assign the entire obligation to CTC.

8 At bottom, it is clear that Caudron on behalf of CPI NV is willing
9 to swear under oath to false statements. Caudron's explanation was that
10 he was careless in the earlier discovery responses and did not read them
11 carefully.⁵ This explanation is not believable, particularly in light of
12 the June 2006, single-page declaration that he signed, under penalty of
13 perjury, which stated that the debt was based on the attached 2001
14 invoice. In light of his later testimony that it was readily apparent
15 from looking at the form of the invoice that it was not an invoice issued
16 by CPI NV, it is clear that his false sworn statement was not a result of
17 a mere lack of care. It was a result of a complete disregard for the
18 truth of statements given under oath in support of a claim he was
19 asserting in this bankruptcy case. At best it was a reckless disregard
20 for the truth. At worst it was intentional deception in connection with
21 CPI NV's pursuit of its claim in this bankruptcy case.

22 CPI NV attempts to meet its burden of proof in part through Mr.
23

24 ⁵ I agree with the states that it appears CTC was preparing the
25 discovery responses for CPI NV, which contained clear untruths. As
26 reprehensible as that conduct is, it is still CPI NV that must prove the
claim, and that must provide truthful responses to discovery requests.

1 Redmond's testimony. To the extent Redmond's testimony corroborates
2 testimony given by Caudron at trial, I find that corroboration without
3 value, as Redmond's version of the facts changed at least as many times
4 as did Caudron's. Further, Redmond had sudden "recollections" of details
5 consistent with Caudron's testimony that occurred only after hearing
6 Caudron's testimony. Those sudden "recollections" were simply not
7 believable.

8 This is a classic case of failure of proof based on a complete and
9 utter lack of credibility. Throughout the course of this case, the
10 states have questioned this claim, seeking documentary or other evidence
11 that this is a debt owed by CTC rather than by Tideline. The only
12 written documentation that the debt belongs to CTC is a 2001 invoice,
13 which was presented by CTC in support of CPI NV's claim in this
14 bankruptcy case and relied on by CPI NV in support of its claim. Now
15 everyone, including Redmond, admits that the 2001 invoice is not a
16 legitimate document. Caudron testified that the invoice could not have
17 been created by CPI NV because of the form it was in. It is also clear
18 that the amount stated in the invoice had not yet been agreed upon in
19 2001. In short, this invoice was a complete fabrication. Yet Caudron
20 continued to rely on it in support of CPI NV's claim as late as June 1,
21 2007.

22 There is no meaningful explanation for the 2001 "invoice." At the
23 trial, Redmond testified that the invoice must have been created by his
24 now-ex-wife. However, that testimony is not credible in light of the
25 numerous false statements by Redmond and the absence of the former Mrs.
26 Redmond to verify that testimony. Nor was there any attempt to explain

1 why, up to practically the eve of trial, CPI NV and CTC continued to
2 assert that the 2001 invoice was valid and used it as documentary
3 evidence of the claim in this bankruptcy case, when it was clear from the
4 form of the invoice that it was a total fabrication.

5 While there is not much that is clear in this case, what is clear is
6 that CTC and CPI NV were willing to rely on false, fabricated documents
7 to support this claim and to swear to multiple false versions of events.
8 It was only after counsel for the states doggedly pursued extensive
9 discovery that uncovered falsehoods and inconsistencies, that Caudron and
10 Redmond admitted that the 2001 invoice was fabricated.

11 It is also clear that there was no agreement in 2001 as to the
12 amount owed to CPI NV, as represented throughout most of the course of
13 this claim litigation. Instead, any agreement about amount was made in
14 2003 or 2004. Further, there was no evidence that the parties ever made
15 an agreement that CTC rather than Tideline would be liable for this
16 debt.⁶ The dealings between the Redmond and CPI NV had been on behalf of
17 Tideline, and CPI NV treated the debt as owed by Tideline. Tideline made
18 the annual payments in 2004, 2005, and 2006.

19 There is just no way to know which version of the facts is true.
20 This is the essence of a failure of proof. This claim fails because of
21 an utter lack of credible evidence establishing the basis for the claim

23 ⁶ Before Redmond had the debt transferred from the books of
24 Tideline to the books of CTC in March 2005, Redmond contacted Caudron to
25 see if there would be an adverse impact on CPI NV if the books of CPI NV
26 showed that the debt was owed by Tideline, but CTC's books showed that it
was CTC's debt. Caudron had no objection to Tideline's transfer of the
debt from Tideline's books to CTC's books.

1 or that the claim belongs to CTC.

2 Because I conclude that CPI NV has failed to prove that it has a
3 claim against CTC, I need not consider whether the obligation violates
4 the statute of frauds, or whether I should disallow the claim as a
5 sanction for CPI NV's repeated false statements in connection with the
6 claim.⁷

7 CONCLUSION

8 Based on the lack of proof of the claim, the claim will be
9 disallowed. Counsel for the states should submit an order disallowing
10 the claim.

11 ####

12 cc: Karen Cordry
13 Robert Carlton
Tara Schleicher

22 ⁷ One of the requirements for imposing sanctions under my
23 inherent authority is that I must consider the adequacy of less drastic
sanctions. Anheuser-Busch, Inc. v. Natural Beverage Distributors, 69
24 F.3d 337, 353 (9th Cir. 1995). Because CPI NV's false sworn statements,
either during discovery or at the hearing on the objection to the claim,
25 lead me to conclude that CPI NV has not proved its claim and therefore
the claim will be disallowed, a sanction of disallowance for those false
26 statements would be redundant.